

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Araceli King,

Plaintiff,

v.

Time Warner Cable, Inc.,

Defendant.

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: Civil Action No.: 1:14-cv-02018-AKH
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PLAINTIFF’S RULE 56.1 STATEMENT OF UNDISPUTED FACTS

1. Plaintiff Araceli King resides in Irving, Texas. [King Depo. Tr.¹ 15:5-6].
2. On July 14, 2012, Plaintiff subscribed to telephone number (915) 861-0528 (the “0528 Number”). [Exhibit 1 to Declaration of Sergei Lemberg].
3. The 0528 Number is a cellular telephone number serviced by Sprint. [King Depo. Tr. 43:5-16; Exhibit 1 to Lemberg Decl.].
4. Plaintiff pays Sprint approximately \$89.00 per month for her cellular telephone service. [King Depo. Tr. 43:17-44:9].
5. Plaintiff has had Defendant Time Warner Cable, Inc.’s (“TWC”) services for approximately ten years. [King Depo. Tr. 63:3-8].
6. Plaintiff provided the 0528 Number to TWC in connection with her TWC account. [King Depo. Tr. 96:2-14].
7. Plaintiff did not provide the 0528 Number to TWC for any other purpose. [Declaration of Araceli King at ¶3].

¹ “King Depo. Tr.” refers to the deposition transcript of Plaintiff Araceli King. Ms. King’s deposition was taken on May 15, 2015. A deposition transcript excerpt is attached as Exhibit 2 to the Declaration of Sergei Lemberg.

8. On July 3, 2013, Plaintiff began receiving calls from TWC on the 0528 Number for “Luiz Perez”. [King Decl. at ¶2; King Depo. Tr. 100:25-101:16; TWC Outbound Dial Log²; Sprint Call Log³; King Screenshots⁴].

9. The account number associated with Mr. Perez’s account is 8260170544640054 (the “Perez Account”). [Zitko Depo. Tr.⁵ 33:3-4].

10. TWC’s calls to the 0528 Number for the Perez Account came from telephone number (800) 892-2253. [King Decl. at ¶2].

11. Between July 3, 2013 and August 11, 2014, TWC placed 163 calls to the 0528 Number on the Perez Account. [Lemberg Decl. at ¶¶7-8; Combined Call Log⁶].

12. TWC used its Enterprise Outbound Interactive Voice Response (“IVR”) dialer to place all 163 calls to the 0528 number. [Zitko Depo. Tr. 18:18-22, 32:2-5, 37:5-11, 89:21-25].

13. The IVR is a computerized system that automatically imports calling lists to be dialed. [Zitko Depo. Tr. 19:5-6, 34-35, 92:23-25, 94:18-25, 95:15-19].

14. The IVR is completely automated and does not require human intervention to make calls. [Zitko Depo. Tr. 38:23-25, 39:2-4].

² “TWC Outbound Dial Log” refers to a document produced by Defendant in the course of discovery, a copy of which is attached as Exhibit 3 to the Declaration of Sergei Lemberg.

³ “Sprint Call Log” refers to a document produced by Sprint in response to a subpoena that contains a record of inbound and outbound calls for 0528 number, a copy of which is attached as Exhibit 4 to the Declaration of Sergei Lemberg.

⁴ “King Screenshots” refers to a photographic capture of Plaintiff’s cellular telephone call history that displays inbound calls from TWC to 0528 number, a copy of which is attached as Exhibit 5 to Declaration of Araceli King.

⁵ “Zitko Depo. Tr.” refers to the deposition transcript of Defendant’s Rule 30(b)(6) witness David Zitko. Mr. Zitko’s deposition was taken on March 25, 2015. A deposition transcript excerpt is attached as Exhibit 7 to the Declaration of Sergei Lemberg.

⁶ “Combined Call Log” refers to a chart that combines a record of all inbound call attempts by TWC to Plaintiff’s cellular telephone number as reflected in the TWC’s Outbound Dial Log, Sprint Call Log, and Kings Screenshots. A copy of Combined Call Log is attached as Exhibit 6 to the Declaration of Sergei Lemberg.

15. The IVR is designed and configured to play a prerecorded message on every call. [Zitko Depo. Tr. 42:2-11, 52:6-17, 73:17-25, 96:17-20].

16. The IVR has the capacity to store numbers. [Zitko Depo. Tr. 44:22-25, 45:6-9, 95:15-19].

17. The IVR has the capacity to dial such numbers. [Zitko Depo. Tr. 18:18-19, 34:2-3, 35:6-15, 37:5-7, 41:23-25, 93:3-16].

18. When Plaintiff answered the calls from TWC, or when she listened to voicemail messages left by TWC, she heard a prerecorded message. [King Decl. at ¶5; King Depo. Tr. 105:25-106:16, 124:5-11, 142:14-18].

19. Some of TWC's voicemail messages were silent, lasting only few seconds. [King Decl. at ¶6; King Depo. Tr. 143:6-25].

20. TWC's prerecorded messages stated that TWC was calling for "Luiz Perez" regarding his overdue account balance. [King Decl. at ¶7; King Depo. Tr. 100:16-24, 101:11-16, 142:14-143:5].

21. Plaintiff does not know "Luiz Perez." [King Decl. at ¶8; King Depo. Tr. 156:2-10].

22. Plaintiff did not consent to receive calls from TWC on the 0528 Number with regard to the Perez Account. [King Decl. at ¶¶3, 8].

23. On October 3, 2013, in a call lasting about seven minutes, Plaintiff spoke to TWC and asked that it stop calling the 0528 Number regarding the Perez Account. [King Decl. at ¶9; Sprint Dial Log; TWC Outbound Dial Log; TWC Inbound IVR Log⁷].

⁷ "TWC Inbound IVR Log" refers to a document produced by Defendant in the course of discovery, a copy of which is attached as Exhibit 8 to the Declaration of Sergei Lemberg.

24. The October 3, 2013 call was the tenth call from TWC to the 0528 Number regarding the Perez Account, following which TWC placed 153 additional calls to the 0528 Number on the Perez Account. [Combined Call Log; TWC Outbound Dial Log; Sprint Call Log; King Screenshots].

25. On January 7, 2014, in a call lasting about three minutes, Plaintiff spoke to TWC and again requested that the calls regarding the Perez Account stop. [King Decl. at ¶10; Sprint Call Log; TWC Inbound IVR Log; TWC Inbound Customer Call History⁸].

26. TWC placed 123 calls to the 0528 Number regarding the Perez Account after January 7, 2014. [Combined Call Log; TWC Outbound Dial Log; Sprint Call Log; King Screenshots].

27. On March 26, 2014, TWC accepted service of the Summons and Complaint in this action, which again placed TWC on notice that it did not have consent to place automated calls to the 0528 Number regarding the Perez Account. [Exhibit 10 to Lemberg Decl.].

28. TWC placed 74 calls to the 0528 Number regarding the Perez Account after March 26, 2014. [Combined Call Log; TWC Outbound Dial Log; Sprint Call Log; King Screenshots].

29. On June 23, 2014, Plaintiff's counsel asked TWC to stop placing calls to the 0528 Number. [Lemberg Decl. at ¶14].

30. TWC placed 14 calls to the 0528 number after June 23, 2014.

31. On June 18, 2015, the Federal Communications Commission ("FCC") adopted a proposal to strengthen the protection of consumers against unwanted robocalls. [Exhibit 11 to Lemberg Decl.].

⁸ "TWC Inbound Customer Call History" refers to a document produced by Defendant in the course of discovery, a copy of which is attached as Exhibit 9 to the Declaration of Sergei Lemberg.

32. In its June 18, 2015, ruling FCC held that “[c]onsumers have the right to revoke their consent to receive robocalls and robotexts in any reasonable way at any time.” [Exhibit 11 to Lemberg Decl.].

33. In its June 18, 2015, ruling FCC further held that “ ‘Autodialer’ is defined in the [Telephone Consumer Protection] Act as any technology with the capacity to dial random or sequential numbers.”

34. In its June 18, 2015, ruling FCC further held that an “Autodiler” definition includes a calling technology that calls consumers from a list of numbers. [Exhibit 11 to Lemberg Decl.].

Dated: June 23, 2015

PLAINTIFF,
Araceli King

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